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*Mar. 11, 12.

YORK v. KRAUSE

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Sale of land—Default by purchaser—Suit by vendor for cancellation of agreement—Forfeiture of payments—Construction of agreement—Recovery by purchaser of moneys paid.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario, which allowed the plaintiff's appeal, and dismissed the defendant's cross-appeal, from the judgment of McEvoy J.

The plaintiff and defendant entered into a written agreement, dated June 26, 1925, for the sale by the plaintiff to the defendant of certain land in Kingsville, Ontario. The purchase price was $13,500, payable "$2,700 in cash on the date hereof and the balance as follows: in four equal annual consecutive payments on the 26th days of June in each year hereafter of $2,700 each together with interest thereon at 7% per annum payable on the amounts of principal from time to time due on the same dates as the said instalments".

The defendant had previously paid a deposit of $200, and at the time of execution and delivery of the agreement he paid the sum of $2,500, making up the cash payment of $2,700 under the agreement. In July, 1926, he paid another sum of $2,700.

The defendant complained that the terms of payment were not expressed in the agreement according to the understanding of the parties on previous negotiations, and that the annual payments of $2,700 should have been blended payments of principal and interest. As to this point the trial judge held that, on the evidence, the defendant should be held to the terms expressed in the agreement.

The agreement contained a provision that unless the payments were punctually made "these presents shall be null and void and of no effect and vendor shall be at liberty to re-sell the said lands and all payments heretofore made are to be forfeited to the vendor as liquidated damages".

In May, 1927, the plaintiff sued, alleging default by defendant in payment of interest and taxes, and claimed

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

recovery of possession of the land and cancellation of the agreement. In August, 1927, the plaintiff entered into an agreement to sell the land to other parties.

The defendant delivered his defence in October, 1927, and counterclaimed for repayment to him of all amounts paid on account of the alleged contract together with interest thereon.

McEvoy J., in his judgment, said that he was satisfied that the property was one of highly speculative value, and that the peculiar wording of the forfeiture clause was made for the purpose of providing what the parties considered would be a fair amount to be forfeited if the defendant should fail to carry out the agreement; and refused to relieve the defendant from the forfeiture of the cash payment of $2,700, in the circumstances revealed in the evidence. He gave judgment for the plaintiff for possession of the land and for a declaration that under the terms of the agreement the same had become null and void and of no effect. He held that the defendant was entitled to recover all amounts paid by him in excess of the sum of $2,700 together with interest thereon at 5% per annum from the date of the sale by the plaintiff to the other parties above referred to. He refused to make any allowance to the defendant for alleged improvements to the property, but did not charge him with any occupation rent.

The plaintiff appealed to the Appellate Division against the judgment of McEvoy J., in so far as he held defendant entitled to recover any sum from the plaintiff. The defendant cross-appealed, asking that the amount awarded him by the judgment be increased to the whole amount paid by him with interest.

The Appellate Division, without written reasons, allowed the plaintiff's appeal, and dismissed the defendant's cross-appeal. The defendant appealed to this Court.

On conclusion of the argument, the judgment of the Court was orally delivered by the Chief Justice, allowing the appeal to the extent of restoring the judgment of the trial judge. The Court was unable to construe the word "heretofore" in the agreement as meaning "theretofore" as had been suggested. As to the construction to be put upon the words "payments heretofore made," the Court

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was of opinion, in view of all that took place, that they should be taken to include the $200 deposit and the $2,500 paid at the time of the execution of the agreement, making $2,700 in all, but nothing more.

Appeal allowed in part, with costs.

S. L. Springsteen for the appellant.

J. H. Rodd K.C. for the respondent.